Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

IN RE: WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA,

Petitioners,

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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85 pp

QUESTION PRESENTED

Where the Court of Appeals resolved the appeal of one party, but did not address the appeal of the other party, should this Court issue a writ of mandamus directing the Court of Appeals to adjudicate the unresolved appeal, or explain why its adjudication was deemed unnecessary to the disposition of the case?

LIST OF PARTIES

Petitioners (plaintiffs below) are: William Mays, Louis Buddy Yosha, Trustee of the Irrevocable Trust Agreement of Cynthia Ann Yosha Snyder, Trustee of the Irrevocable Trust Agreement of Laura Sue Yosha, Trustee of the Irrevocable Trust Agreement of Brandon Abraham Yosha, Trustee of the Louis Buddy Yosha Charitable Remainder Unitrust for the Benefit of Janet E. Yosha and Alan Bradley Yosha, and Trustee of the Louis Buddy Yosha Charitable Remainder Unitrust, Individually and as Purported Trustees for The Trump-Indiana Charitable Foundation.

Respondent (defendant below) is Trump Indiana, Inc.

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CITATION OF OPINIONS AND ORDERS

The panel opinion of the Court of Appeals for the Seventh Circuit in this case is reported as Mays v. Trump Indiana, Inc., 255 F.3d 351 (7th Cir. 2001).

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Jurisdiction in this Court is based upon 28 U.S.C. § 1651(a).

The judgment in question was entered by the United States Court of Appeals for the Seventh Circuit on June 18, 2001.

On August 20, 2001, the Court of Appeals entered an Order denying the plaintiffs'-appellants' petitions for rehearing and rehearing en banc. That Order also dismissed as moot all other pending motions, including plaintiffs'-appellants' Notice of Undecided Appellate Issue, which was submitted on July 26, 2001.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The All Writs Act, 28 U.S.C. § 1651(a), provides as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The petitioners, William Mays, Louis Buddy Yosha, and several trusts Yosha created for the benefit of his children, filed this action against Donald Trump and Trump Indiana, Inc. ("Trump") in 1996. Federal jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. § 1332(a).

On March 3, 1999, the jury rendered two separate verdicts in favor of each plaintiff (Mays and Yosha) and against defendant Trump Indiana, Inc. The jury found in favor of defendant Donald Trump personally. (App., p. 22a). In one verdict, the jury found that Trump had breached a contract to permit Mays and Yosha to purchase a .9375 percent ownership interest in Trump's Gary, Indiana riverboat project, and awarded damages to each plaintiff in the sum of $667,062.00. In a separate verdict form, the jury found that Trump had breached a contract with Mays and Yosha to establish and fund a specific Charitable Foundation, in return for plaintiffs' agreement to allow Trump to use the plaintiffs' names and reputations in support of Trump's application to the Indiana Gaming Commission for one of a very limited number of riverboat gaming licenses. The District Court entered partial Judgment on the jury verdicts on March 10, 1999. (App., pp. 26a-27a).

Because Mays and Yosha sought specific performance of the Charitable Foundation contract, the jury resolved only the contract formation and liability issues in its Charitable Foundation verdict. The remedy for Trump's breach of contract to establish a defined Charitable Foundation was to be determined by the District Court judge, the Honorable Richard L. Young.

The District Court refused to enforce the Charitable Foundation contract. The defendant Trump argued, and the District Judge held, that because the contract between Trump and the plaintiffs to create the Charitable Foundation would

bestow a financial benefit upon established charities that served residents of the City of Gary, the Mayor of the City of Gary was actually a third party beneficiary of the contract, by virtue of his elected office. (App., p. 36a).

The District Court held that the Mayor, as the "third party beneficiary," could agree with Trump to reduce Trump's funding obligation to less than 10% of the original agreed amount, in return for Trump redirecting that benefit to a newly created charity, serving a different group of the Mayor's constituents, and to substitute the Mayor and his employees as the fund administrators. This reduction and diversion of the consideration promised by Trump to the plaintiffs was over the protest and objection of the plaintiffs, who had already fully performed their obligations under the contract. The District Court entered Final Judgment on December 9,1999 (App., pp. 46a-47a). The same "novation" defense had been argued to, and rejected by, the jury.

Mays and Yosha appealed from the District Court's refusal to provide a remedy in response to the jury's verdict that Trump breached its contract with Mays and Yosha to establish and fund a specific Charitable Foundation. The defendant supported the District Judge's "novation" holding but did not otherwise appeal from the jury's liability finding on the Charitable Foundation contract.

On cross-appeal, Trump raised the issue of whether the jury's verdict on plaintiffs' individual claims for breach of contract could survive as a matter of law. Trump argued that the terms under which Trump had offered to finance plaintiff's purchase of these individual stock interests, and the mechanism for determining "fair market value" in a stock redemption provision, were material terms of that contract which were unresolved. Neither the financing option nor the right of redemption were part of the Charitable Foundation contract.

The Court of Appeals found in favor of Trump on its cross-appeal of the jury verdict for breach of the individual investment contract, on the grounds that the financing and repurchase provisions were material elements of that alleged contract and were insufficiently certain to constitute an enforceable contract for the sale of stock interests in the Trump Indiana riverboat project to the individual plaintiffs. (App., pp. 14a-16a).

The Court of Appeals opinion, however, did not address the separate jury finding of breach of the contract to create and fund the Charitable Foundation. Nor did it address the plaintiffs' appeal of the District Court's refusal to enforce a remedy for Trump's breach of its obligation to create and fund the Charitable Foundation.

On July 26, 2001, plaintiffs submitted a Notice of Undecided Appellate Issue, specifically raising the issue of plaintiffs' unresolved appeal. (App., pp. 50a-54a). By Order dated August 20, 2001, the Court of Appeals dismissed "all other pending motions" as moot. (App., pp. 56a-57a). On August 28, 2001, the Court of Appeals issued its mandate and returned the record to the District Court. The mandate to the District Court recited that the District Court judgment was "reversed" and directed entry of judgment in favor of defendant Trump Indiana, Inc.

Petitioners are not seeking review of the Court of Appeals decision with respect to the jury verdict for breach of contract on the individual investment claims. Petitioners are, however, seeking a writ of mandamus directing the Court of Appeals to adjudicate petitioners' appeal with respect to the District Court's refusal to enforce the jury verdict for breach of the Charitable Foundation contract, or to explain why it deemed that adjudication unnecessary.

ARGUMENT

The Court of Appeals reversed one jury verdict in favor of petitioners on their individual investment claims because certain material terms as to financing and repurchase were allegedly absent or too indefinite to create an enforceable contractual agreement. The problem is that the Court of Appeals did not address the second jury verdict on the Charitable Foundation contract. The terms of the Charitable Foundation were set forth in writing, in detail, in the "completed foundation documents" prepared b Trump's attorneys and sent to (and approved by) petitioners (App., pp. 58a-66a). The defendants did not claim, nor did the Court of Appeals identify, any uncertainty or ambiguity with respect to these terms.

The uncertainties identified by the Court of Appeals with respect to the terms of the individual investment claim do not apply to the jury's separate finding of an enforceable contract to create and fund the Charitable Foundation. Unlike the individual investors, the Foundation was not required to purchase its shares. Therefore, the terms under which the individual investors might elect to obtain seller financing of their purchase price – which the Court of Appeals found too indefinite – could not even arguably have been part of a contract to establish the Charitable Foundation. Similarly, only the individual investors, and not the Foundation, were subject to a right of repurchase.

In most appeals, an appeal and a cross-appeal represent two sides of the same coin, and a ruling on one resolves the issues on both. In this case, however, the resolution in favor of Trump on its cross-appeal on the individual investor claims neither resolves nor addresses petitioners' appeal of the District Court's failure to enforce the separate jury verdict with respect to the Charitable Foundation.

Because the Court of Appeals declined the opportunity to amend or supplement its panel opinion, petitioners have no ruling on their appeal and no explanation as to why. Without the benefit of a ruling or an explanation for avoiding a ruling, a petition for certiorari on the Charitable Foundation claim cannot be filed. Petitioners therefore have no choice but to seek the extraordinary remedy of mandamus.

A. Standards For Issuing A Writ Of Mandamus

This Court has frequently recognized that the "traditional use" of the writ of mandamus has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). See also Mallard v. United States District Court for Southern District of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978); La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957).

This Court has also required petitioners to demonstrate that their right to issuance of the writ is clear and indisputable. Mallard, 490 U.S. at 309.

Pursuant to Supreme Court Rule 20.1, to justify the granting of a writ of mandamus, the petition "must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Petitioners seek a writ of mandamus directing the panel of the Court of Appeals for the Seventh Circuit which issued the opinion disposing of Trump's appeal to issue a ruling on petitioners' appeal to that Court, or to issue an

express explanation as to why a ruling on plaintiffs' appeal was deemed unnecessary to the disposition of the case. The members of the panel were the Honorable Frank H. Easterbrook, the Honorable Kenneth F. Ripple, and the Honorable Terence T. Evans, all Circuit Judges of the United States Court of Appeals for the Seventh Circuit.

B. The Writ Will Be In Aid Of The Court's Appellate Jurisdiction

Petitioners are well aware that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. In this case, however, petitioners are entitled to a ruling on their appeal, or an explanation for the lack of a ruling, and they have nowhere else to turn. The issue of the unresolved appeal was presented to the Court of Appeals, which could have clarified or supplemented its panel opinion. Instead, the Court of Appeals summarily dismissed the matter as moot.

As noted above, one of the traditional uses of the writ of mandamus has been to compel a lower court to exercise its authority when it is its duty to do so. Petitioners recognize that the Court of Appeals is not required to decide issues that are unnecessary to the disposition of the case. By the same token, however, the Court of Appeals is obliged to decide those issues that are necessary to the disposition of the case, or at least to provide an explanation as to why it did not address or decide an issue squarely presented to it.

It is fundamentally unfair for an appellate court to refuse to adjudicate an issue without giving some reason for its inaction. A refusal to adjudicate directly affects the jurisdiction of this Court because the litigant has been given no ruling to form the basis for a possible petition for certiorari. The supervisory and appellate powers of this

Court are frustrated because there is no ruling to appeal or reasoning or analysis provided by the lower court.

This case illustrates the dangers of a refusal to adjudicate. Plaintiffs Yosha and Mays appealed from the District Court's refusal to order specific performance of the Charitable Foundation contract. The District Court found that there had been a "novation," as a result of a substitute agreement entered into between Trump and the Mayor of the City of Gary. According to the District Court, the Mayor of Gary had the authority to renegotiate the terms of the plaintiffs' contract, over the plaintiffs' objections. For example, the Mayor agreed to reduce Trump's funding obligation from approximately $18 million worth of stock to approximately $1 million in cash, in return for Trump's agreement to change the trusts' beneficiaries and to substitute the Mayor and his designees for the independent trustees of the foundation.

Simply put, the District Court determined that the Mayor, solely by virtue of his office, became the third party beneficiary of a contract between plaintiffs and Trump to provide funds to charitable organizations within the city, and as such the Mayor was empowered to intercept and redirect the funds, and to alter the terms of the agreement for the funding of such charities. The Court of Appeals should have ruled on plaintiffs' appeal from this unwarranted and unprecedented decision of the District Court, or at least made an express determination that would explain to the bench and bar why the Court deemed it unnecessary to address plaintiffs' appeal.

Where a lower court persistently and without reason refuses to adjudicate a case properly before it, the higher court may issue a writ of mandamus in order that it may exercise the jurisdiction of review given by law. Will v. Calvert Fire Ins. Co., supra, 437 U.S. at 661_62, 98 S.Ct. at 2557. See also Thermtron Products, Inc. v. Hermansdorfer,

423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976); La Buy v. Howes Leather Co., supra; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762 (1910).

In some cases, this Court and other courts have directed the lower court to act expeditiously to adjudicate a matter without actually issuing the writ of mandamus. See, e.g., In re Blodgett, 502 U.S. 236, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992); Connor v.Coleman, 440 U.S. 612, 99 S.Ct. 1523, 59 L.Ed.2d 619 (1970); Madden v. Myers, 102 F.3d 74 (3d Cir. 1996); In re Scott, 163 F.3d 282 (5th Cir. 1998).

Without the benefit of a ruling from the Court of Appeals, or a clear explanation for a non-ruling, the petitioners herein cannot properly evaluate their next step in this case. Moreover, the bench and bar in this circuit and district will have difficulty determining the applicable law, particularly on the issue of the power of elected officials to alter their constituents' private contracts. By granting this petition, this Court would encourage the Court of Appeals to write opinions that address all necessary issues, so that future petitions such as this one can be avoided.

C. Exceptional Circumstances Warrant The Exercise Of The Court's Discretionary Powers

After the Court of Appeals issued its panel opinion in this case, plaintiffs filed a Notice of Undecided Appellate Issue, which specifically reminded the panel that no decision or opinion had been rendered on the issues presented by plaintiffs' appeal. (App., pp. 50a-54a). The Court of Appeals could have made the present petition unnecessary by clarifying or supplementing its panel opinion, but it chose instead to dismiss plaintiffs' request as moot. (App., p. 56a-57a).

Petitioners do not believe it is possible that the panel sua sponte reversed the jury's liability finding on the Charitable Foundation contract, even though Trump's cross-appeal did not question the jury's verdict of liability for breach of the Charitable Foundation contract, and even though neither party briefed nor argued that issue in the context of the Charitable Foundation Contract. Trump did assert that more certainty of terms was required to order specific performance than to enter a money judgment, but Trump did not raise any claim of uncertainty of terms in the Charitable Foundation contract at either the trial court or on appeal.

It seems unlikely that the panel intended to both raise and resolve an issue not presented to the trial court and not briefed on appeal, in a written opinion that never directly addresses any alleged uncertainty in any of the terms of the Charitable Foundation contract. It is more likely that the Court of Appeals simply failed to recognize that the appeal and cross appeal did not involve the same jury verdict. The panel's mandate recited that it "reversed." If that was intended to be its ruling on the plaintiff's appeal from the District Judge's "novation" ruling, the mandate should have ordered a remedy, or ordered the District Court to fashion one. The mandate directive to enter judgment in favor of defendant is only consistent with the panel's having ruled only on the cross appeal. In the absence of any decision on the plaintiff's appeal, the District Judge's expansion of mayoral power to alter private contracts stands as law in the Seventh Circuit, without the availability of appellate review.

Petitioners seek nothing more than a decision on their appeal. They should be entitled to that. This Court has recognized that a writ of mandamus may be issued where a lower court "obstinately refuses to adjudicate a matter properly before it...." Will v. Calvert Fire Ins. Co., supra, 437 U.S. at 666, 98 S.Ct. at 2559. Regrettably, this appears to be such a case.

This case is exceptional for three primary reasons. First, the Court of Appeals was squarely presented with the opportunity to clarify or supplement its panel opinion, but chose to do nothing. Second, the Charitable Foundation claim is of considerable public interest. If petitioners ultimately prevail on the Charitable Foundation claim, they would receive no personal financial benefit. But, Trump Indiana, Inc. would be obligated to provide over $18 million in funding and to create the promised Charitable Foundation.

The winners would be the charitable organizations who receive funding from the Foundation and the people in and around Gary, Indiana who desperately need the promised resource.

Finally, the panel's refusal to rule has apparently let stand as law an unacceptable and unconstitutional grant of power for an elected official to interfere with private contracts and to seize private funds for the political use and benefit of the elected office holder.

D. Adequate Relief Cannot Be Obtained In Any Other Form

The only other form of relief potentially available to petitioners would be a petition to this Court for a writ of certiorari. The problem is that the Court of Appeals issued no ruling on plaintiffs' appeal and offered no explanation for the lack of a ruling. Petitioners should not be required to guess what the Court of Appeals intended, and neither should this Court. Petitioners cannot reasonably be expected to seek certiorari with respect to a nullity.

If the Court of Appeals ruling was intended to affirm the District Court's finding of "novation" as to the Charitable Foundation contract, that would raise serious issues suitable for certiorari, such as impairment of private contractual obligations by local government, in this case the City of Gary through its Mayor. At this point, however, without the

benefit of a ruling from the Court of Appeals or an explanation for not ruling, petitioners can only speculate. That is an insufficient basis on which to seek a writ of certiorari.

E. Adequate Relief Cannot Be Obtained From Any Other Court

Petitioners sought relief from the Court of Appeals on this specific issue by way of their Notice of Undecided Appellate Issue, submitted on July 26, 2001. That motion was dismissed as moot by Order dated August 20, 2001. The Court of Appeals returned the case to the District Court upon issuance of the mandate on August 28, 2001.

The District Court has no authority to compel the Court of Appeals to issue a ruling or explanation with respect to the issues raised by plaintiffs' appeal to the Court of Appeals. Petitioners already unsuccessfully sought relief from the Court of Appeals on this specific issue. Although that Court has the inherent power to recall or amend its mandate, it would be futile to ask the Court of Appeals to reconsider the same motion it already rejected. Petitioners are not aware of any potential remaining avenues of relief from the Court of Appeals.

Petitioners respectfully submit that their only option for obtaining adequate relief is the present petition to this Court for a writ of mandamus directing the panel of the Court of Appeals which heard this case to adjudicate the issues presented by plaintiffs' appeal or provide a clear and complete explanation as to why a decision on those issues was thought to be unnecessary to the Court's disposition of the case.

CONCLUSION

Petitioners respectfully request this Court to issue a writ of mandamus to the United States Court of Appeals for the Seventh Circuit, and specifically to the Honorable Frank H. Easterbrook, the Honorable Kenneth F. Ripple, and the Honorable Terence T. Evans, Circuit Judges of the Court of Appeals for the Seventh Circuit, directing them to adjudicate the issues presented by petitioners' appeal to that Court, or to provide a clear and complete explanation as to why the Court deemed a decision on those issues unnecessary to its disposition of the case.

In the alternative, petitioners respectfully request this Court to order the same relief without actually issuing the writ of mandamus, subject to the condition that if the Court of Appeals fails to act within thirty (30) days, petitioners may renew their request for a writ of mandamus.

Respectfully submitted,

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Nos. 00-1083 & 00-1138

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WILLIAM MAYS, LOUIS BUDDY YOSHA, Trustee of the charitable remainder unitrust, CYNTHIA ANN YOSHA SNYDER, Trustee of the irrevocable trust agreement, et al., Plaintiffs-Appellants/ Cross-Appellees,

v.

TRUMP INDIANA, INCORPORATED,
Defendant-Appellee/ Cross-Appellant,

and

Donald J. Trump,
Defendant-Appellee.

September 29, 2000, Argued
June 18, 2001, Decided

PROCEDURAL POSTURE: Plaintiff investors filed suit and claimed defendant corporation breached a contract. A jury found in favor of the investors. The United States District Court for the Southern District of Indiana, denied their request for specific performance to require the corporation to create a charitable foundation. The investors appealed on the specific performance question and the corporation cross-appealed arguing that no contract was ever formed.

OVERVIEW: The investors found a contract by piecing together several documents, the corporation said no binding deal was reached: there were negotiations, there were ideas, there were proposals, and there were plans, but there was no finished contract upon which the investors could have sought

damages or specific performance in court. The appellate court determined that at all that occurred was an agreement to agree, and that was unenforceable under state law. Because so many material terms of this complicated deal were never reduced to the kind of solid contract that could be comfortably enforced in a court of law, the judgment of the district court was reversed.

OUTCOME: The judgment of the district court was reversed and the case remanded to the district court for the entry of judgment in favor of the corporation.

COUNSEL: For WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA, Plaintiffs _ Appellants (00_1083): James R. Fisher, ICE MILLER, Indianapolis, IN USA.

For WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA, Plaintiffs - Appellees (00-1138): James R. Fisher, ICE MILLER, Indianapolis, IN USA.

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JUDGES: Before EASTERBROOK, RIPPLE, and EVANS, Circuit Judges.

OPINIONBY: EVANS

OPINION:

EVANS, Circuit Judge. It was extremely controversial, and it passed over the veto of then-Governor Evan Bayh, but Indiana enacted legislation in 1993 permitting, for the first time, riverboat gambling in several Hoosier counties contiguous to Lake Michigan, the Ohio River, and Patoka Lake. Two of several possible gambling licenses were earmarked for Gary, a troubled city in the shadow of a megatropolis -- Chicago.

Promoters of gambling argued that it would bring loads of cash into communities like Gary and spark an economic renaissance. This was welcome news for a smokestack-shrouded, rust-belt city like Gary, a city devastated by the loss of thousands of steel industry jobs and left with block after block of decaying houses and empty storefronts. Things had gotten so bad in Gary that in 1993, when the gambling measure passed, its homicide rate (91 slayings per 100,000 residents) left it with the nasty moniker of "Murder Capitol" of the United States.

This case is a saga about the gambling license snaring process and its fallout. The cast of characters includes two folks from Indianapolis: William Mays and Louis Buddy

Yosha. Mays is a successful businessman, the owner (with his wife) of the Mays Chemical Company and two radio stations (KISS 106.7 and WIRED 100.9 FM), an investor in many other enterprises, a philanthropist, and a multimillionaire. Yosha is a very successful plaintiff's personal injury attorney. In the other corner is Donald Trump, known to some as The Donald and to others as the former husband of Ivana. Trump's activities here were through several of his companies, particularly a new one called Trump Indiana, but we'll refer to all of them simply as "Trump" (and we'll use "he" and "it" interchangeably) as we slug our way through this opinion.

In a nutshell, Mays and Yosha (and several trusts Yosha created for the benefit of his children, another detail we can ignore) claim Trump breached a contract (1) to make them minority (1 percent each) partners in his Indiana gambling enterprise and (2) to create a foundation with the two of them on its board of directors and little control from Trump to benefit various charitable causes in Indiana. A jury found for Mays and Yosha and awarded them $ 1.4 million in damages. After a court trial, the district judge denied Mays and Yosha's request for specific performance, finding that a different charitable organization the Trump Indiana Foundation was an acceptable novation inspired substitute for what Mays and Yosha wanted. The judge did, however, order that Mays and Yosha get seats on the board of the new foundation. Mays and Yosha appeal on the specific performance question and Trump cross appeals, saying no contract was ever formed and Mays and Yosha are entitled to nothing.

To best understand this case, and to support why we resolve it as we do, a lengthy review of the facts, sprinkled with several observations as we go along, is necessary.

Normally, when someone wants to start a business, one simply starts it. But everything's different in a regulated

industry, and it's even more different in a super regulated, explosively charged business like legal gambling. There's a lot of politics involved in this sort of undertaking and a lot of minefields to traverse before the prize a license to engage in legal gambling is won. And under the 1993 law, the Indiana Gaming Commission decided who would win that prize.

The two Gary licenses were to be issued first, and applicants were required "to provide assurances that economic development will occur in Gary and that adequate infrastructure and site preparation will be provided to the riverboat operation." Ind. Code § 4-33-6-7(b). Consequently, Gary applicants had to build an "approved hotel" or "cause economic development that would have an economic impact on the city exceeding the economic impact that the construction of an approved hotel would have." Ind. Code § 4-33-6-7(b).

This was a State of Indiana operation, yet the City of Gary was, quite understandably, very interested in the license-awarding process. It wanted a voice, and one can easily understand why. So Gary requested proposals from potential applicants even before they made contact with the state commission. Gary's request outlined several demands to be met before the city would endorse (though its endorsement wasn't legally required) an application to the commission. One of Gary's requirements was that an applicant have 15 percent local ownership.

Most people can smell money when they hear the phrase "riverboat gambling." That was especially true when it was "riverboat gambling" within sight of a place like Chicago. Trump -- and Mays and Yosha, for that matter -- had nothing wrong with their noses. They could sniff the smell of money. Trump, as most everyone knows (judicial notice is usually confined to undisputable facts like Greenwich mean time, but we feel safe here), controls an empire that includes a

gambling casino in Atlantic City, New Jersey. Mays was active in politics and a member of the Indiana State Lottery Commission. He testified during the trial that "gaming was a really profitable activity" and a "printing press for money." As things were playing out, it looked like the road to that money ran through Gary, and Trump -- along with his competitors -- took steps to secure a favorable nod from the city.

As the process unfolded it became apparent that, as far as Gary was concerned, there were four horses in this race but only two would finish in the winner's circle. Trump was one of the four, and it was trying hard to enhance its standing with the city as 1993 came to a close.

Fifteen percent local ownership in the riverboat casino came to be seen as a nonnegotiable demand for winning Gary's endorsement. Trump did not need nor want local investment, yet it gave in. According to a Trump executive: It 15% local ownership was not something that we wanted to do. As indicated on that first line in the first page of Exhibit 200, a December 30, 1993, letter to Trump from the Gary mayor's office, we were at this time negotiating with the City to get their endorsement of Trump Indiana's application when we did go before the Gaming Commission. And the City had indicated that they were not under any circumstance going to give us that endorsement absent our agreement to do this. So we did agree to make 15% of the equity available to Gary residents essentially in exchange for the City's endorsement.

The city memorialized its understanding of Trump's commitment (the same December 30, 1993, letter just mentioned) to be: (1) spending at least $ 153.35 million on the riverboat and accompanying facilities; (2) creating 1,675 new permanent jobs; (3) filling 67 percent of those jobs with Gary residents and 90 percent with Lake County residents; (4) using best efforts to maintain 70 percent racial minority

and 52% female employment; and (5) making at least 15 percent of the equity in the company available to Gary residents. If Trump was selected by the state gaming commission, a binding development agreement was required to memorialize these commitments. Trump was not alone here, as all other applicants for licenses made similar commitments to the city. Competition for Gary's endorsement, and a license from the state, was obviously fierce.

Trump then turned his attention to identifying local investors before February 14, 1994, the date another step in the application process was due before the state commission. But bad news arrived when Trump learned Gary would not endorse its application, but would instead endorse two other applicants. Undaunted, Trump continued its efforts to identify local investors because it believed a third license might be awarded to Gary, and if the commission gave it to Trump, a development agreement with the city, which would require local ownership, would still be necessary. As a Trump executive put it, "We wanted to be sure that on a going-forward basis if we were fortunate enough to be awarded the license that our relationship with the City of Gary was on very amicable terms."

By early 1994, seven individuals from the Gary area and two from Indianapolis -- Mays and Yosha -- were tapped to be Trump's "local investors." The entree to Mays was through a Trump attorney (Greg Hahn), Mays' friend since the days when both were living and apparently going to school in Evansville, Indiana. Mays (and Yosha, for that matter) had no connection with Gary, but because this was still a State of Indiana license, it was thought that someone of statewide prominence would gussy up Trump's application.

At this point it is helpful to step back and view the lawsuit claims of these parties. Mays and Yosha claim they entered

into a binding contract with Trump and that they held up their part of the bargain, while Trump did nothing he was contractually obligated to do. Mays and Yosha find "the contract" by cobbling together several documents, notably letters of February 26, 1994 (trial exhibit 5), April 6, 1994 (trial exhibit 10), and September 16, 1994 (trial exhibit 35).[1] Trump says no binding deal was reached: there were negotiations, there were ideas, there were proposals, and there were plans, but there was no finished contract upon which Mays and Yosha could seek damages or specific performance in court. While the jury, in a simple general verdict, found for Mays and Yosha on their claim that a contract was breached, whether as a matter of law (Indiana law applies) a contract was formed is a different question, one committed to a judge or, at this stage of the case, a panel of judges.

Back to the facts. Mays and Yosha (and the seven folks -- later reduced to six -- from Gary, including a doctor, an optometrist, a steel worker, a union president, and a school administrator) were listed as "proposed local minority participants" on Trump's license application filed with the state gaming commission. The February 26 letter (we'll have something to add from this letter in the penultimate paragraph of our opinion), sent to Mays and Yosha by Trump's attorneys, said "nine (9) investors . . . will own, collectively, 7.5 percent of the project being developed in Gary." The letter also stated that "7.5 percent will be owned by a trust, which will make contributions to charitable organizations throughout the Gary area."

On April 6, 1994, Trump attorney Hahn sent letters to Mays and Yosha which included the following statements regarding the terms of the proposed deal:

> The investors will be holders of Class "B" stock which "will not have the full voting

> privileges of Class 'A' stock but will have the same per share economic rights with respect to dividends."
>
> The Class "B" stock will be owned equally by a charitable trust (7.5%) and the identified group of eight (8) individual investors (7.5%), of which you are one.
>
> Trump has agreed to "loan" each investor an amount equal to their investment. By executing the non-recourse promissory note, you, as an investor, agree to pay Trump the principal sum of $ 1,434,750.00.
>
> The principal amount is to be paid solely from cash distributions or dividends declared by Trump Hotels & Casino Resorts, Inc.
>
> Trump will have the first right of refusal to purchase your stock if you decide to sell said stock in the future.

The finality of these terms is qualified in the letter by the following statements:

> It is reasonable to assume that the accompanying financial information will also be fluctuating as the proposal is revamped.
>
> Presently, it is anticipated that 85% of the total number of stock issued will be Class "A" and the remaining 15% will be Class "B."
>
> Again, the total development cost figure ($ 153 million) and the ultimate amount that your investment represents is subject to change. We

> have not completed all the terms of this transaction. We hope to have all the documents finished for your review within the next 2-3 weeks.

On May 24, 1994, Hahn wrote Mays and Yosha regarding the charitable foundation project mentioned in the April 6 letter:

> In order to give the Indiana Gaming commission an idea of what we are striving for, we would like to go ahead and designate ten local charities as part of the foundation. In that vein, please give us an indication as to whether or not you would be willing to serve on the foundation, and a list of charities you believe should be included.
>
> . . . .
>
> We will be contacting you on or about June 1, 1994, with the date and times of the investment meetings to be held in Gary and we would appreciate having received your input with respect to the charitable organizations and/or your willingness to serve on the foundation by that time.

Enclosed with the letter was a copy of a document entitled "The Trump-Indiana Charitable Foundation," identifying Trump Marina Resorts, Inc. d/b/a Trump Princess Indiana, Inc. as the "Donor" but with an open space for the names of the "Trustees."

In August and September 1994, the Indiana Gaming Commission conducted hearings regarding the license selection process. At those hearings, commissioners raised questions about Trump's application centering on the "local

investors." In answer to a question from one of the commissioners (Sundwick), a Trump representative explained:

> A: Can I address one part of your question with respect to why we did this because I was the decision-maker. It was strongly suggested during the approval process. This was one of the major criteria in determining the acceptability of a proposal from the City of Gary, that local participation was mandatory and that was what was carried back to me by our representatives. If you're asking me, Does this make economic sense? Does it make business sense? Absolutely not. I have to finance this project. I have to put in real dollars and real equity.
>
> . . . .
>
> But as for investors, in all candor, there is no economic basis to do that. It became part of the process.
>
> Q: It wasn't the policy that was actually just required.
>
> A: No, no, it certainly wasn't. Mr. Trump and I discussed it in some great deal because we had a lot of problems understanding why and on what basis we would do something like this.

Another commissioner, Bochnowski, then commented:

> I mean the intent is to have local involvement. This is not local involvement. This is like

> buying names so that you can look like you have local involvement, and you're no different than anybody else in this regard, and that's why we have these so-called local investors from Indianapolis. Hopefully this experience will not be carried out in other states.

During the hearing process, in answer to a commission letter asking for responses to six questions, Hahn (with another member of his law firm) sent a letter to the gaming commission on September 16. This letter, which we noted earlier is relied on (along with the letters of February 26 and April 6) by Mays and Yosha to prove the existence of their contractual rights, listed the eight investors, their net worth, and a range of details about the investors' involvement and the structure and workings of the proposed charitable foundation.

We are now at the critical point in time in the case. Trump says he decided that the whole "local investors" thing was not helping the quest for a license, so he jettisoned the idea and proceeded on a different track. This move, says Mays and Yosha, was a breach of contract for which they are entitled to damages representing the value of the equity interest in the casino that did not come their way plus the establishment of a foundation over which they would exercise substantial power.

After the Trump/Mays-Yosha divorce, Trump moved stock around several of his companies and eventually offered new stock in a public sale. This was happening at a time of uncertainty because Trump did not yet have a license to operate the casino. In addition, there were concerns about whether operating a riverboat casino on Lake Michigan would be permissible under federal law. And Trump also was fighting a rearguard action against Mays and Yosha who tried

to convince the gaming commission that Trump should not get a license for several reasons, including his breach of contract with them and his involvement in inappropriate financing and public stock offerings. Ultimately, the commission issued a license, the project went forward, and Trump established a different charitable foundation that was acceptable to the City of Gary.

The pivotal issue is whether the alleged contractual agreement Mays and Yosha say they had with Trump was sufficiently certain to create the two enforceable obligations they seek to establish. The first obligation would require Trump to cut Mays and Yosha in on the final deal to the extent of a 1 percent ownership (a .9375 percent share, to be exact) interest for each. The second obligation would be to create a charitable foundation exactly as described in the letters of February 26, April 6, and September 16 of 1994.

Before the trial of this case, both sides moved for summary judgment, arguing that the facts were not in dispute and that a contract existed (Mays and Yosha) or didn't exist (Trump), as a matter of law. The motions were denied. After Mays and Yosha presented their case, and again before the jury spoke, Trump moved for judgment in his favor as a matter of law. Both motions were denied. For the reasons we are about to note, we think no binding contractual agreement was reached.

Under Indiana law, and in fact the law of every jurisdiction, a meeting of the minds on all essential terms must exist in order to form a binding contract. See Eastern Natural Gas Corp. v. Aluminum Co. of America, 126 F.3d 996, 1002 (7th Cir. 1997) (applying Indiana law). And a mere agreement to agree does not a binding contract make. As the Indiana Supreme Court observed in

> Wolvos v. Meyer, 668 N.E.2d 671 (Ind. 1996), it is quite possible for parties to make

> an enforceable contract binding them to prepare and execute a subsequent final agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. That document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called "contract to contract" is not a contract at all.

Id. at 674-75 (quoting Corbin on Contracts § 2.8, p. 131 (rev. ed. 1993). The Wolvos court clarified this statement by noting, "The question of whether an agreement is an enforceable . . . contract or merely an agreement to agree involves two interrelated areas: 'intent to be bound and definiteness of terms.'" Id. at 675. Without an express statement of intent, the focus is on whether the contract is too indefinite to enforce. Thus, the existence or nonexistence of a contract turns on whether material terms are missing. And here, material terms are absent in spades.

Mays and Yosha, unlike the six Gary "local investors," (who, by the way, settled their disputes with Trump before trial) were savvy in the ways of business deals and law. While we have no reason to doubt that both were interested in the proposed charitable aspects of the arrangement, the fact remains that this was a financial deal for them that was almost too good to be true. For essentially doing little more than adding their names to the Trump license application -- which would demonstrate that the Trump team was "Hoosierized" -- they were to receive a financial windfall. They would get a million or so dollars with no risk because, for most of the time, the proposed "loan" to them for the

purchase price of their "investment" was without recourse and the "loan" was to be repaid with Trump's money. Anyone in his right mind would jump at the chance to get on a gravy train like this.

As a general proposition, common sense dictates that as an agreement becomes more complex, the need for clarity and formality increases. An agreement to sell a sofa at a rummage sale requires a lot less than an agreement to sell a house. And this was a very complex, multimillion-dollar venture. Early in the process, Trump thought adding "locals" like Mays and Yosha to his team would have value when the city and/or the state gaming commission considered his license application. But the details of how they were to participate, although sketched in broad outline, were never cemented. Would the Mays/Yosha "notes" be recourse or nonrecourse? What if any interest rate would attach to the "loan"? Neither Mays nor Yosha ever saw a finalized promissory note. What was the duration of the loan? What were its terms of repayment? Would security for the loan (if it was recourse) be required? And a particularly key element in the deal -- also undefined -- was Trump's right to repurchase the proposed investors' stock. If that right was exercised, how would the price and terms of repurchase be established? None of these details, it seems, were even discussed, much less finalized. In short, what we have here is best characterized as an agreement to agree, and that is unenforceable under Indiana law. Wolvos, at 674_75.

Further support for finding that essential terms were still to be nailed down can be found, ironically, in two of the three letters Mays and Yosha point to as evidence of the existence of a finished contract. The February 26 letter, while opening with a confusing statement that (Mays or Yosha) is "an investor in the Trump application" (whatever that means), concludes with this statement: "Our office looks forward to working with you and we will be communicating with you in

the next few days to arrange a meeting wherein you can meet with us . . . to discuss, in further detail, the Gary project and your specific participation." The letter of April 6, while noting the Trump right-of-first refusal if an investor decides to sell the stock, says, "We have not completed all the terms of this transaction. We hope to have all the documents finished for your review within the next 2-3 weeks." These statements demonstrate that further clarifications and modifications on material points were anticipated.

In their suit, Mays and Yosha were essentially seeking millions for almost nothing because for a time they thought they were going to get exactly that, millions for almost nothing. For lending their names to the Trump team during the license application process, but without actually investing any money or putting any of their assets at risk, Mays and Yosha hoped to hit a jackpot once the casino boat was launched. The desire to put one's self in that position is completely understandable. But this complicated deal was never reduced to the kind of solid contract that could be comfortably enforced in a court of law. The judgment of the district court is REVERSED and the case REMANDED to the district court for the entry of judgment in favor of the defendants.

Footnotes

[1] These letters, by the way, were sent by Trump's local counsel in Indiana, Don Tabbert (February 26), Mr. Hahn (April 6), and Tabbert and Hahn (September 16). Although their authority to generally act for Trump is unquestioned, their actual authority to bind him to specific contractual provisions is less than clear. In fact, Trump testified (by deposition) at the trial that his ground troops in Indiana were his regular people, Nicolas Ribis and Robert Pickus. He said, in fact, that he would sue Hahn and Tabbert "if they did anything other than" what he instructed them to do, which

was not get tangled up with "local investors."

you come back out, your minds will be a little clearer, and I'll read to you the instructions, and then you'll be allowed to begin your deliberations. Thank you very much.

(COURT IN RECESS)

THE COURT: Did you get a chance to get a little brea and get your food ordered and all that? Good. I'm going to read to you the final instructions as to the law in this case and how you're to conduct your deliberations, and then you wiL go back to deliberate your verdict.

(THE COURT READING FINAL INSTRUCTIONS TO THE JURY)

THE COURT: I have the verdict form here, ladies and gentlemen, consists of a cover page, one, two, three, four, five pages. And I want to read it to you quickly. All right?

On the contract claim regarding the ownership interest in Trump Indiana, Inc., with respect to the plaintiff Louis Yosha's claim for breach of contract to acquire an ownership interest in Trump Indiana, Inc., we, the jury, find for the plaintiff Louis Yosha and against the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and assess damages in the sum of blank. With respect to the plaintiff Louis Yosha's claim for breach of contract to acquire an ownership interest in Trump Indiana, Inc., we, the jury, find for the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and against the plaintiff Louis Yosha, dated and then signed by the foreperson.

On the contract claim of Mr. Mays, with respect to plaintiff William Mays' claim of breach of contract to acquire an ownership interest in Trump Indiana, Inc., we, the jury, find for the plaintiff William Mays and against the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J.

Trump, and assess damages in the sum of blank. With respect tc plaintiff William Mays' claim for breach of contract to acquirc an ownership interest in Trump Indiana, Inc., we, the jury, find for the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and against the plaintiff Wiiliatr Mays. Dated and signed by the foreman.

The contract claim regarding the charitable foundation, with respect to plaintiff William Mays' claim for breach of contract to establish a charitable foundation, we, the jury, find for the plaintiff William Mays and against the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump.

With respect to plaintiff Wiliam Mays' claim for breach of contract to establish a charitable foundation, we, the jury, find for the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and against the plaintiff William Mays.

The charitable foundation contract claim regarding Louis

Yosha: With respect to plaintiff Louis Yosha's claim for breach of contract to establish a charitable foundation, we, the jury, find for the plaintiff Louis Yosha and against the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump.

With respect to plaintiff Louis Yosha's claim for breach contract to establish a charitable foundation, we, the jury, find for the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and against the plaintiff Louis Yosha.

Fraud claim: Do not complete this form if you found for the defendants on the plaintiffs' claim for breach of contrac to acquire an ownership interest in Trump Indiana.

MR. FISHER: Judge, that's got to be backward. THE COURT: That's wrong. I'm glad I read this. If you find against right. Do not complete this form if you found against the defendants on the plaintiffs' claim for breach of contract to acquire an ownership interest in Trump Indiana. In other words, if you find for the plaintiff and against the defendants on the breach of contract claims, then you do not proceed to the fraud.

However, if you do not find that there was a contract and that there was a breach, then you proceed on to the fraud.

With respect to plaintiff William Mays' fraud claim, we, the jury, find for the plaintiff William Mays and against the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and assess plaintiff's damages in the sum of blank.

With respect to plaintiff Louis Yosha's fraud claim, we, the jury, find for the plaintiff William Mays and against the defendant or defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and assess plaintiffs' damages in the sum of blank.

We, the jury, further find that the plaintiffs, William Mays and Louis Yosha, are entitled to a punitive damages award in the amount of blank. If the plaintiffs are not entitled to recover an award of punitive damages against the defendants, write the word "none" in the appropriate blank provided above.

We the jury find for the defendant, defendants, insert Trump Indiana, Inc., and/or Donald J. Trump, and against the plaintiffs.

Those are the verdict forms in this case, ladies and gentlemen, and the instructions will be provided to you. The

verdict forms will be provided to you when you go back to the jury room. You may now retire to the jury room to perform your deliberation. Thank you very much.

Christina, would you please stand and raise your right hand.

(BAILIFF SWORN)

THE COURT: Christina, would you now please take the jurors to the jury room, and I'll send the instructions in and the verdict forms in momentarily. Thank you very much.
MR. HUSER: No, thank you, Your Honor.

MR. BROWN: Your Honor, we are working on a reconciliation of the exhibit list. That audit is in progress

THE COURT: All right. Hearing no further comments for the record regarding the trial and the rulings of the Court, we'll show the record is closed as to that at this time

MS. MILLER: Let me just explain what's going on with the exhibits. The lists that we each kept agree with each other, but they include exhibits that the Court's list does no show as being admitted, or at least whatever list we've been working from, so we're trying to just make sure that our lists are accurate.

(COURT IN RECESS WHILE JURY DELIBERATES)

(VERDICT AT 12:40 a.m.)

(THE FOLLOWING PROCEEDINGS TOOK PLACE IN THE PRESENCE OF THE JURY)

THE COURT: I was going to say good evening, but it's good morning at this time. Ladies and gentlemen, the bailiff has informed me you've reached a verdict. Is that true?

JURY FOREMAN: Yes, Your Honor, we have.

THE COURT: Would the foreman please hand the verdict forms to the bailiff.

(FOREMAN COMPLYING WITH REQUEST)

THE COURT: All right. This is Yosha and Mays versus Trump Indiana, Inc., IP 96-425-C, verdict on the contract claim. With respect to the plaintiff Louis Yosha's claim for breach of contract to acquire an ownership interest in Trump Indiana, Inc., we, the jury, find for the plaintiff Louis Yosha and against the defendant Trump Indiana, Inc., and assess damages in the sum of $667,062, dated today, signed by the foreperson.

On the contract claim with respect to plaintiff William May's claim for breach of contract to acquire an ownership interest in Trump Indiana, Inc., we, the jury, find for the plaintiff William Mays and against the defendant Trump Indiana Inc., and assess damages in the sum of $667,062, dated today, signed by the foreperson.

On the contract claim regarding the charitable foundation, with respect to the plaintiff William Mays' claim for breach of contract to establish a charitable foundation, we, the jury, find for the plaintiff William Mays and against the defendant Trump Indiana, Inc.

With regard to the charitable foundation claim with respect to plaintiff Louis Yosha's claim for breach of contract to establish a charitable foundation, we, the jury, find for the plaintiff Louis Yosha and against the defendant Trump Indiana, Inc.

And the fraud claim, they did not proceed to.

All right. I've just read those verdicts, Ms. Pehl, is that your verdict?

JUROR PEHL: Yes.

THE COURT: Ms. Freeman, is this your verdict?

JUROR FREEMAN: Yes, it is.

THE COURT: Mr. Stout, your verdict?

JUROR STOUT: Yes, it is.

THE COURT: Where do I go next? Mr. Martin?

JUROR MARTIN: Yes, it is.

THE COURT: All right. Ms. Ramey?

JUROR RAMEY: Yes.

THE COURT: Mr. Haehl?

JUROR HAEHL: Yes.

THE COURT: Ms. Petry?

JUROR PETRY: Uh-huh.

THE COURT: And Mr. McConnell --

JUROR McCONNELL: Yes, sir.

THE COURT: -- your verdict?

JUROR McCONNELL: Yes, sir.

THE COURT: Unanimous verdict. Show the jury is polled, and it is indeed a unanimous verdict.

Ladies and gentlemen, that will conclude our proceedings in this trial. I want to thank you so much. I want to thank you on behalf of the Court and the staff, the attorneys and the parties. You've worked very hard in this case. You've been very attentive.

And I think I told you early on that you'd find it interesting. I hope you did find it at least to be an interesting experience, and I hope also you found that by spending all this time with us and letting the other things going in your personal lives be put on the shelf for a few days, I hope you feel that you satisfied one of your obligations as a citizen of our community. You've helped us resolve these cases, and for that we are grateful.

So with that I'll excuse you for this trial. Again, thank you. Christina and Jo will provide paperwork for you if you need that. Also we'll make sure that you are able to get to your cars and transportation home as necessary.

Thank you very much. You may now go back to the jury room, and Jo and Christina will be back there for you.

(THE FOLLOWING PROCEEDINGS TOOK PLACE OUTSIDE THE PRESENCE OF THE JURY)

THE COURT: Do the attorneys wish to examine the verdict forms?

MR. HUSER: No, Your Honor.

THE COURT: All right. Do you wish to examine the verdict forms?

MR. FUNK: No, Your Honor.

THE COURT: Any other record we need to make at this time? Mr. Fisher.

MR. FISHER: Only explanation as to how your part of this will be resolved, Your Honor.
THE COURT: I knew you were going to ask me that. Give me a couple days to think about that.

MR. FUNK: Us, too.

THE COURT: And certainly suggestions any of you night have would be appreciated. But give me a couple days to take a look at some cases and some law and see actually where I can go on this and what we can do. And I'm going to be back here a couple times yet again this month. I'll try to maybe -- try to notify you in advance, and maybe we can get together and make some progress on this. Okay?

As I said earlier, you're all pros. You did a great job, and it's nice being able to watch you work.

MR. HUSER: As did you, Judge.

COURT ADJOURNED

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Judge Farris Mason, CSR #95-E-3001 Date February 16. 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP-96-0425-C-Y/S

WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, and TRUSTEE OF THE LOUTS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST, Individually and as Purported Trustees for the Trump Foundation, Ltd.,

Plaintiffs,

vs.

DONALD J. TRUMP and TRUMP INDIANA, INC.,

Defendants.

JUDGMENT ENTRY ON JURY VERDICT

Pursuant to the Jury Verdict dated March 3, 1999, in the above captioned case, the court hereby enters JUDGMENT against defendant Trump Indiana, Inc. and for plaintiff Louis Yosha for a breach of contract to acquire ownership interest in Trump Indiana, Inc., assessing damages in the sum of $667,062.00.

Pursuant to the Jury Verdict dated March 3, 1999, in the above captioned case, the court hereby enters JUDGMENT against defendant Trump Indiana, Inc. and for plaintiff Williams Mays for a breach of contract to acquire ownership interest in Trump Indiana, Inc., assessing damages in the sum of $667,062.00.

This is only a partial judgment. The court has not entered judgment on the plaintiffs' claim for specific performance regarding the charitable foundation.

So ordered this 10 day of March, 1999

Richard L. Young, Judge
United States District
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP-96-0425-C-Y/S

WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, and TRUSTEE OF THE LOUTS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST, Individually and as Purported Trustees for the Trump Foundation, Ltd.,

Plaintiffs,

vs.

DONALD J. TRUMP and TRUMP INDIANA, INC.,

Defendants.

ENTRY

On March 4, 1999, at the conclusion of the trial of this matter, the jury entered a verdict in favor of the Plaintiffs, fmding the Defendant breached its contract with the plaintiffs to establish a charitable foundation. On March 23, 1999, the Court, sitting in Equity, heard oral argument on Plaintiff's claim for specific performance of the contract the jury found existed between plaintiffs and Defendant Trump Indiana, Inc.

The Court now enters its Findings of Fact and Conclusions of Law in denying the plaintiffs claim for specific performance.

FINDINGS OF FACT

I. The Third-Party Beneficiary Contract

1. On September 28, 1993, Trump Hotels and Casino Resorts, Inc. d/b/a Trump Princess Indiana submitted Part I of its Indiana River boat Gambling License Application to the Indiana Gaining Commission ("Application"), seeking the right to conduct a River boat gaming operation in Gary, Indiana. Trump Hotels and Casino Resorts, Inc. later changed its name to Trump Indiana, Inc. (hereinafter, "Trump Indiana")

2. In the last quarter of 1993, representatives of the City of Gary and Mayor Thomas Barnes invited parties interested in operating a Gary River boat to present proposals in an effort to secure the City's endorsement.

3. Trump Indiana, along with several other gaming operators, made written and oral presentations to the City's representatives, including Mayor Barnes. These presentations led to negotiations between the City and the gaming operators regarding economic benefits for the City of Gary and its residents.

4. As a result of Trump Indiana's negotiations with the City, on December 30, 1993, the City of Gary proposed by letter to Trump Indiana that it commit to development expenditures of at least $152.35 million; that Trump Indiana commit to create *1,675* new permanent jobs, filling 67% of these jobs with Gary residents and 90% with Lake County residents; and that it commit to use its best efforts to maintain 70% racial minority employment and *52%* female employment. Trump Indiana was also requested to make at

least 15% of the equity in its River boat gaming operation available to Gary residents. The City asked Trump Indiana to commit that if it were selected by the Indiana Gaming Commission, a formal, binding development agreement would be executed to memorialize the commitments made in 1993 and any other terms agreed to by the parties. (Exhibit 200)

5. In an effort to mee its commitment to the City regarding *15%* local ownership and meet the due date for Part H of the gaming Application, counsel for Trump Indiana sought local investors. The persons contacted included seven individuals from Lake County, and William Mays and Louis Yosha, both of Indianapolis. (One of the individuals from Lake County later withdrew.)

6. On February 14, 1994, Trump Indiana submitted Part II of the Application to the Indiana Gaming Commission. Part II listed Mays and Yosha as Proposed. Local Minority Participants. (Exhibit *50)* Before theft names were listed, Mays and Yosha had agreed to participate in the project as local investors.

7. In Part II of its Application, Trump Indiana set forth the anticipated Common Stock capitalization:

The authorized Common stock will be divided into two classes, Class A and Class B. . . . Fifty percent of the Class B shares would be held by a group of residents of the State of Indiana. The remaining *50%* of the Class B shares would be placed in a trust or foundation to be administrated by trustees consisting of or selected by the other Class B Stockholders (the "Trust"). Income and principal (when appropriate) from the Trust would be used for a variety of public and civic purposes as specified in the Trust Agreement and determined by the Trustees to benefit the residents of the City of Gary.

(Exhibit 50)

8. In letters dated February 26, 1994, and April 6, 1994, Trump Indiana offered the eight local investors the opportunity to purchase 7-1/2% of the Class B non-voting stock or .9375% each, in exchange for the execution of a non-recourse promissory note in the amount of $1,434,375. (Exhibits *5* and 10)

9. According to the February 26, 1994 letter, "The remaining *7.5* percent will be owned by a trust, which will makç eontributions to charitable organizations throughout the Gary area." (Exhibit *5)* The April 6 letter provided, "The Class "B" stock will be owned equally by a charitable trust *(7.5%)* and the identified group of eight (8) individual investors *(7.5%).* . .." (Exhibit 10) These were the only statements in these letters concerning the charitable trust.

10. The jury found that a contract existed between Mays and Yosha, and Trump Indiana. This contract was created by the discussions with Trump Indiana counsel in January and February 1994, and the February 26 and April 6, 1994 letters to Mays and Yosha.

11. The contract entered into between plaintiffs Yosha and Mays did not specifically identify who the third-party beneficiaries of the charitable trust would be. The only statements about beneficiaries made before the April 6, 1994 letter was the statement in Part II of the Application that, "Income and principal. . . would be used for a variety of public and civic purposes. . . to benefit the residents of the City of Gary" (Exhibit 10) and the statement in the February 26, 1994 letter that the trust "will make charitable contributions throughout the Gary area." (Exhibit 10)

12. Trump Indiana's counsel exchanged letters with Mays and Yosha in May and June concerning the proposed

charitable trust. In these letters, Mays and Yosha identified possible recipients of the trust's distributions throughout the state of Indiana. No agreement was made with Trump Indiana as to whom trust distributions would be made. (Exhibits 20, 21,22,23and26)

13. The contract entered into between plaintiffs Yosha and Mays and Trump Indiana did not specifically identify the third-party beneficiary nor give Yosha or Mays the right to decide who the third-party beneficiary would be.

14. At the time the conract was entered into, the primary beneficiaries identified were the residents of the City of Gary. (Exhibits 10, 50)

15. After the contract was entered into with Mays and Yosha, each was asked if he was willing to serve on the board of the charitable foundation. Yosha agreed to serve on the board. (Exhibit 26) Mays agreed to "serve on the foundation if he (Trump) needs me." (Exhibit 22)

II. Creation of the Charitable Foundation

16. On December 9, 1994, the Indiana Gaming Commission issued a Certificate of Suitability for a River boat gaming license to Trump Indiana. The Certificate was valid for 180 days. The Certificate required Trump Indiana, inter alia, "to expeditiously negotiate and execute an agreement with the City of Gary finalizing the commitments between [Trump Indiana] and the City of Gary. (Exhibit 54)

17. In November 1995, Scott King was elected Mayor of the City of Gary and took office in January 1996. After taking office, the City of Gary employed attorney Nick Thiros to negotiate its agreement with Trump Indiana, including the structure and funding of the Trump Indiana

Foundation. (Pickus testimony; Hahn testimony; Affidavit of Scott King, ¶¶ 3-6)

18. The City of Gary was concerned about funding the foundation with Trump Indiana stock. The City believed that funding with stock created uncertainties about whether the River boat would be successful, whether and when it would generate dividends, and whether the stock could be sold. (Pickus testimony; Hahn testimony; King Affidavit, ¶ 7)

19. At Mayor King's direction, Thiros proposed that the foundation be funded with cash rather than stock. Following negotiations, the City and Trump Indiana agreed to an initial funding of $1,000,000 followed by annual contributions of $100,000. (Pickus testimony; Hahn testimony; King Affidavit, ¶8)

20. In negotiating this deal, the City believed that these cash contributions were reasonably equivalent to the value of 7-1/2% of the stock of Trump Indiana and would guarantee income for the foundation. (Pickus testimony; Exhibit 281; King Affidavit, ¶ 8)

21. Mayor King proposed that the foundation's income be used to fund scholarships for graduating seniors of Gary's public high schools. (Pickus testimony; King Affidavit, ¶ *9)*

22. On February *9,* 1996, Trump Indiana Foundation Ltd. was created. Schedule C to the Foundation's Section *501(c)(3)* Application described the Foundation's purpose as follows:

Generally, this organization will support the education of youth with a focus upon academic achievement and financial need of high school students. The organization will also support general philanthropic causes, including but not limited to community projects in Gary, Indiana and financial

support of other charitable organizations exempt under Section *501(c)(3)* of the Internal Revenue Code of 1986, as amended.

Specifically, the private foundation will grant substantial scholarships to graduating seniors of the various public high schools of Gary, Indiana who will attend a two-year college, four-year college, or technical/vocational school based upon the following criteria:

1. Academic Achievement;

2. Financial Need; and

3. Demonstrated Interest in Community Service.
(Exhibit 227) -

23. On May 1, 1996, the City of Gary and Trump Indiana entered into a Development Agreement that contained the following provisions:

Section 6.10 The Trump Foundation. On February 9, 1996, Developer caused the formation of The Trump Foundation as an Indiana nonprofit public benefit corporation. The City and Developer shall enter into a separate agreement to memorialize their agreements regarding The Trump Foundation, which include that: (i) Developer shall file and diligently prosecute an Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Exemption Application"); (ii) conditioned solely upon the Internal Revenue Service approving the Exemption Application, Developer shall contribute to The Trump Foundation $50,000 on or before July 1, 1996, $950,000 on or before December 31, 1996, and $100,000 on or before the close of each calendar year thereafter; (iii) Developer shall cause the Mayor and the Superintendent of Schools of the City of Gary and the

principal of each Gary public high school and the Gary Performing Arts School to be appointed to the Board of Trustees of The Trump Foundation; and (iv) Developer shall also cause The Trump Foundation, as one of its charitable purposes, to grant scholarships in the amount of $5,000 each to ten (10) graduating seniors of Gary public high schools and the Performing Arts School who have been accepted to attend either a two-year or four-year accredited college, based on the criteria of academic achievement, financial need, and demonstrated interest in community service.

(Exhibit 238)

24. The May 1, 1996 Development Agreement was ratified and approved by the City of Gary and satisfied the commitment of Trump Indiana to enter into a development agreement with the City. (Exhibit 238)

25. Trump Indiana met its commitments to the Indiana Gaining Commission and the City by establishing the Trump Indiana Foundation and funding it in the manner requested by the City. (King Affidavit, Par. 110)

26. The Trump Indiana Foundation that exists today is the result of negotiations conducted by the City of Gary for the benefit of its residents. (Pickus testimony; Hahn testimony; King Affidavit)

27. The Trump Indiana Foundation has been funded by Trump Indiana through an initial contribution of $1,000,000 followed by two annual contributions of $100,000 each. (Pickus testimony; King Affidavit)

28. The foundation's trustees serve without compensation. Trump Indiana has donated office space and clerical services for the foundation. The foundation pays no rent or other operational expenses. (Pickus testimony)

29. Trump Indiana has not paid any dividends. If the charitable trust had been funded with Trump Indiana stock, it would not yet have received any cash from dividends that could have been applied to charitable purposes.

30. The Trump Indiana Foundation has funded $200,000 in scholarships for Gary high school graduates seeking higher education. (Pickus testimony)

31. The residents of the City of Gary were the intended third-party beneficiaries of the contract entered into with Yosha and Mays.

32. In its negotiations with Trump Indiana, the City of Gary acted for the benefit of the third-party beneficiaries to the contract.

33. The charitable foundation formed as a result of the agreement between the City of Gary and Trump Indiana replaced the charitable trust contemplated in the contract between Mays and Yosha and Trump Indiana.

III. The Nature of the Contract for Which Specific Performance Is Sought

34. The terms of the third-party beneficiary contract, which the plaintiffs seek to specifically enforce, stated that 7-1/2% of the Trump Indiana stock would be transferred to a charitable foundation.

35. Plaintiffs do not request that 7-1/2% of Trump Indiana's stock be transferred to the foundation. Rather, the plaintiffs seek a hybrid form of relief. They seek to invoke equity to create a charitable foundation, but ask that the foundation be awarded damages, in a range of values plaintiffs contend would have been realized from a stock sale at the time of the initial public offering on June 12, 1995.

36. If the charitable foundation had been established pursuant to the contract with the plaintiffs, Mays and Yosha would have been two of the nine trustees and would not have been able to control the vote on whether stock held by the foundation would be sold. (Exhibit 20)

37. In order to award the relief plaintiffs seek, the Court would have to make a number of assumptions. The Court would have to make assumptions about (a) whether the stock could be sold pursuant to the buy-sell agreement applicable to minority shares; (b) whether the trustees would have decided to sell the stock; (c) when the trustees would have made that decision; (d) how much of the stock would have been sold and how much would have been retained; (e) whether the retained stock would have been later sold; (t) when the trustees would have decided to sell the remaining shares of stock; and (g) what the stock would have been sold for on those unknown dates.

38. The contract that plaintiffs seek to enforce is not sufficiently specific to enforce in the way requested. That is, the contract lacks sufficient terms to support a fmding that the foundation would have sold all of its stock at the time of the initial public offering on June 12, 1995.

39. The evidence presented was insufficient to support a finding that the foundation would have sold all of its stock on June 12, 1995.

40. The evidence presented at trial regarding the value of the stock was based on different methods of valuation and involved a wide range of possible values. Plaintiffs' own expert testified to a broad range of values. The value of the stock is not ascertainable without the trier of fact exercising its judgment to assess the amount of damages.

41. Any Finding of Fact included herein that is actually a Conclusion of Law shall be deemed to be a Conclusion of Law.

CONCLUSIONS OF LAW

IV. General Principles of Equity and Specific Performance

1. Plaintiffs' request for the creation and funding of a charitable foundation Specific performance is an extraordinary invokes the equity jurisdiction of this Court. equitable remedy which is not available as a matter of right. Madison Plazas Inc. v. Shanira Corp., 387 N.E.2d 483, 486 (Ind.App. 1979); Buckmaster v. Platter, 426 N.E.2d 148, 150 (Ind. Ct.App. 1981).

2. The granting of specific performance rests in the sound judicial discretion of the trial court. Madison Plaza Inc., 387 N.E.2d at 486; Neel v. Cass County Fair Association, 240 N.E. 2d 5465 (Ind. App. 1968). Courts shaping decrees in equity are vested with broad discretionary powers. United States v City of Chicago, 631 F.2d 469, 472 (7th Cir. 1980).

3. Whether specific performance is or is not appropriate must be determined in light of all the circumstances of the particular case. Parks v. Koser, 126 N.E.2d 785, 789 (Ind.App. 1955); Harter v. Morris, 123 N.E. 23, 26 (Ind.App. 1919).

4. Even if the terms of a contract are clear and unambiguous, the remedy of specific performance rests in the discretion of the court. Ryan v. Summers, 142 N.E. 879, 880 (Ind.App. 1924).

5. The exercise of this discretion should be "based on informed, rather than arbitrary, considerations in accordance with settled judicial rules and principles of equity. Summerlot v. Summerlot, 408 N.E.2d 820, 827 (Ind.Ct.App. 1980).

6. Greater certainty in a contract is required to invoke specific performance than is required for a remedy at law. Equitable enforcement will be denied where there is ambiguity, doubt or uncertainty with respect to the contract. Risk v. Thompson, 147 N.E.2d 540, 546 (Ind. 1958); Neel v. Cass County Fair Ass'n., 240 N.E.2d 546 (Ind.App. 1968).

7. "'The contract must be capable of being specifically enforced, and be of a nature that the court can decree its complete performance against both parties without adding to its terms.'" Louisville, New Albany & Chicago R. W. Co. v. Bodenschatz, supra, 1895, 141 Ind. 251, at page 263, 39 N.E. 703, at page 707. See also, Becker v. McDonald, 488 N.E.2d 729, 733-734 (Ind.Ct.App. 1986).

8. "By the election of a remedy inconsistent with specific performance the right thereto has been waived. 81 C.J.S. Specific Performance § 22, pp. 454, 455." Risk v. Thompson, 147 N.E.2d 540 (Ind. 1958).

9. "In order for a contract to be specifically enforceable it must appear that the party trying to obtain specific performance of the contract has no adequate remedy at law, and, accordingly, specific performance of a contract will not be ordered where the only thing to be done is the payment of money." 26 INDIANA LAW ENCYCLOPEDIA, Specific Performance, § 1, pp. 64-65 (citing Risk v. Thompson, 147 N.E.2d at 545).

10. "[T]here is a maxim that courts of equity will not do or require the doing of a vain or useless thing." Cantwell v.

Cantwell, 143 N.E.2d 275, 280 (Ind. 1957), cert. denied, 356 U.S. 225 (1958); Hirsch v. Merchants National Bank & Trust Co., 336 N.E.2d 833, 836 (J.nd. 1975) ("It is axiomatic that the law does not require the doing of a useless thing."). "Equity has long held that it will look to the substance of a situation and not to the form; nor does equity require to be done that which is fruitless." Laidlaw v. Tucker Freight Lines. Inc., 263 N.E.2d 756, 758 (Ind. 1970).

11. Equity acts in the present tense by molding decrees to actualities, not history. Ohio Sealy Mattress Manufacturing Company v. Kaplan, 745 F.2d 441, 451 (7th Cir. 1984).

12. "Equity always attempts to get at the substance of things to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will not suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction." Walter v. Balogh, 619 N.E.2d 566, 568-69 (Ind. 1993).

V. The Law of Third-Party Beneficiary Contracts

13. The plaintiffs' request for specific performance is premised upon the breach of a third-party beneficiary contract. A third-party beneficiary contract exists when (1) the parties intend to benefit a third-party; (2) the contract imposes a duty on one of the parties in favor of the third-party; and (3) the performance of the terms of the contract renders a direct benefit to the third-party intended by the parties to the contract. Nat. Bd. of Exam. v. Am. Osteopathic Ass'n., 645 N.E.2d 608, 618 (Ind.App. 1994). A third-party beneficiary not a party to the contract may enforce the terms for its benefit. Id.

14. A third-party beneficiary contract requires more certainty than other contracts before it may be enforced to benefit the third party. Nat. Ed. of Exam., 645 N.E.2d at 618;

Barth Elec. Co. v. Travior Bros Inc., 553 N.E.2d 504, 506 (Ind.Ct.App. 1990). A contract may not be enforced to the benefit of a third party unless the clear intent of the contracting parties is to benefit an identifiable third party. Id.

15. Where a contract is made for the benefit of a third person, the beneficiary, although not a party to the contract, may maintain an action upon it for specific performance if he accepts its terms. 26 INDIANA LAW ENCYCLOPEDIA, § 5, Specific Performance, p. 70; Clavpool v. Board of School Commissioners of Indianapolis, 31 N.E. 665, 132 Ind. 261 (1892).

16. The intended "beneficiary has the same power over his rights derived from contracts with other persons that he has over his rights created by contracts made with him in person." 4 CORBIN ON CONTRACTS, § 811, p. 235 (1951). Consequently, the intended beneficiary has the right to discharge or modify his right against the promisor by a release, a substituted contract or novation, or an accord and satisfaction. Id. "The right of the promisee and the right of the beneficiary, although born of the same creative factors and with the same inherited defects, now have separate lives of their own; and the vicissitudes that are met by the one does not necessarily affect the other." Id. at § 818, pp. 779-780.

17. Neither the promisor nor the promisee can prevent the third party beneficiary from joining with them in an agreement varying the duty to the beneficiary. Restatement 2d of Contracts, § 311, comment a.

18. Novations and substitute agreements are essentially synonymous in Indiana. A novation requires four elements: (1) a valid contract; (2) an agreement to a new contract; (3) a valid new contract; and (4) the new contract must extinguish the old one. 22 INDIANA LAW ENCYCLOPEDIA, Novation, § 1, p. 154. Similarly,

regarding substituted agreements, "a contract may be discharged by a new agreement the terms of which are so inconsistent with the first that they cannot subsist together." Better Taste Popcorn Co. v. Peters, 114 N.E. 817, 819-820 (Ind.App. 1953).

VI. Conclusions Regarding Specific Performance of the Contract

19. Plaintiffs have elected an unusual remedy regarding the charitable foundation. As stated in plaintiffs' "Withdrawal of Claim for Remedy of Specific Performance of Transfer of Stock," plaintiffs seek "to fund such Charitable Foundation with an amount of money equal to the assets that the Trump Foundation could have realized from its 7-1/2% ownership interest of the Trump Riverboat Project." The Court has interpreted that decision to mean, "[p]laintiffs continue to assert the remedy of specific performance in creating the Trump Foundation; and if specific performance is ordered, plaintiffs seek an amount in damages equivalent to 7-1/2% of Trump Indiana stock to fund that foundation." Revised Entry on Trump's Motion to Reconsider and/or Clarify.

20. The jury was not asked to and did not identify an intended beneficiary. This remains an issue to be decided by the Court.

21. The jury was not asked to and did not determine whether specific performance is appropriate. This remains an issue to be decided by the Court.

22. The negotiations between Trump Indiana and the City of Gary, acting on behalf of its residents, resulted in an agreement to create a charitable foundation that replaced, and is an equitable substitute for, the contract that was made between Mays and Yosha and Trump Indiana. This

subsequent agreement discharged the obligation to create and fund the charitable foundation contemplated in Trump Indiana's contract with Mays and Yosha.

23. Plaintiffs may not specifically enforce the contractual obligation allegedly owed to a third-party beneficiary, when the intended beneficiary has entered into a substituted agreement with Trump Indiana.

24. Plaintiffs' right to specific performance regarding the creation of a second charitable foundation and the funding of that foundation with the speculative value of 7-1/2% of the stock in Trump Indians has been superseded by the City of Gary's agreement to create the Trump Indiana Foundation and fund it with cash rather than stock.

25. The establishment and funding of another foundation would be a duplication of the foundation that already exists. It would be vain or useless to order the creation of a second foundation to serve the same purpose as the existing foundation.

26. The establishment of another foundation would elevate substance over form and provide the City of Gary and its citizens with a windfall in the form of a double recovery. Allowing such a double recovery, at Trump Indiana's expense, does not conform with substantial justice.

27. Plaintiffs' claim intermingles specific performance and money damages. Plaintiffs want specific performance only as a means to access a remedy of money damages. This would require the Court to create plaintiffs' version of the Trump charitable foundation and fictionally award it 7-1/2% of the stock in Trump Indiana. Rather than ordering specific performance, the Court is asked to engage in a Speculative series of events to provide money damages.

28. The contract terms urged upon this Court cannot be enforced without adding to or significantly modifying the original contract. The conversion of the stock of Trump Indiana into money cannot be accomplished without speculation. The Court has neither contract terms nor evidence to guide its hand in this task.

29. The essence of plaintiffs' claim is a request for money. As such, plaintiffs have an adequate remedy at law. The existence of an adequate remedy at law precludes specific performance.

30. Plaintiffs have the right to enforce Trump Indiana's promise that Mays and Yosha would serve as trustees or board members of the charitable foundation.

31. Any Conclusion of Law included herein that is actually finding of fact shall be deemed a Finding of Fact.

It is, therefore, ORDERED and DECREED that:

1. William Mays and Louis Buddy Yosha are hereby appointed trustees of the Trump Indiana Foundation, Ltd., to serve in those positions in accordance with the Articles of Incorporation, By-Laws and other governing provisions of the Trump Indiana Foundation, Ltd.

2. The Trump Indiana Foundation, Ltd. is the equitable equivalent of the charitable trust contemplated in the contract between William Mays and Louis Buddy Yosha and Trump Indiana. Therefore, defendant Trump Indiana has met its obligation regarding the creation and funding of the charitable foundation and plaintiffs are not entitled to an award of money to a new charitable foundation.

Final Judgment consistent with this Entry and with the Judgment Entry on the Jury Verdict dated March 10, 1999, shall now issue.

SO ORDERED 9 day of December, 1999.

Richard L. Young Judge
Judge, United States strict Court
Southern District, Indianapolis Division

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CASE NO. IP 96-0425-C-Y/S

WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF, BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, and TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST,
Individually and as Purported Trustees for
The Trump Foundation, Ltd.,
Plaintiffs,

V.

DONALD I. TRUMP and TRUMP INDIANA, INC.,
Defendants.

FINAL JUDGMENT

The court, having this day made its Entry,

It is therefore ordered, adjudged and decreed that the plaintiffs' claim for specific performance is denied. The court now incorporates its Judgment Entry on the Jury Verdict, dated March 10, 1999, to make this a final and complete judgment.

SO ORDERED this 9 day of December, 1999.

Richard L. Young, Judge
United States District Court
Southern District of Indiana

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CASE NO. IP 96-0425-C-Y/S

WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA, TRUSTEE OF THE]RREVOCABLE TRUST AGREEMENT OF, BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, and TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST,
Individually and as Purported Trustees for
The Trump Foundation, Ltd.,
Plaintiffs,

V.

DONALD I. TRUMP and TRUMP INDIANA, INC.,
Defendants.

ENTRY ON PLAINTIFFS' MOTION
TO STRIKE AFFIDAVIT

On March 23, 1999, the court conducted a post-trial hearing regarding the propriety of a charitable foundation. Subsequent to the hearing, defendant Trump Indiana, Inc. tendered a brief regarding plaintiff William Mays' and plaintiff Louis Buddy Yosha's specific performance claim as well as the Affidavit of Scott L. King, Mayor of the City of Gary, Indiana for the purposes of aiding the court (1) to

identify the third-party beneficiary to the parties' contract and (2) to demonstrate that specific performance is not an appropriate remedy given the present facts. Plaintiffs' filed a motion to strike the Affidavit of Mayor King. The court, having heard the parties' oral argument, and having read and reviewed the designated evidence, and the applicable law, now denies said motion to strike.

It is therefore ordered, adjudged and decreed that plaintiffs' motion to strike the Affidavit of Scott L. King is denied.

SO ORDERED this
United States Disrict Court
Southern District of Indiana

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-1083 and 00-1138

WILLIAM MAYS, LOUTS BUDDY YOSHA, Trustee of the Irrevocable Trust Agreement of CYNTHIA ANN YOSHA SNYDER, Trustee of the Irrevocable Trust Agreement of BRANDON ABRAHAM YOSHA, et al.
Plaintiffs-Appellants/Cross-Appellees,

Vs.

TRUMP INDIANA, INCORPORATED and DONALD J. TRUMP,
Defendants-Appellees/Cross-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. IP96-0425-C-Y/S

Honorable Richard L. Young, Judge
United States District Court

APPELLANTS' NOTICE OF UNDECIDED APPELLATE ISSUE

The Panel decision in this matter, which is now pending on a Petition for Rehearing, resolved only one of the two appellate issues presented to the Seventh Circuit. The purpose of this notice is to remind the Panel that no decision or opinion has been rendered to date on one of the two appeals.

If this matter is ultimately returned to the District Court, as a result of the Panel's opinion on the cross-appeal of Defendant Trump, without the Panel addressing and resolving the issues presented by the Plaintiffs' appeal, the case will be in a jurisdictional limbo in which the trial court could not proceed on remand, nor could further appeal be pursued by either party from the unresolved appellate issue

The jury in this case rendered two separate verdicts in favor of each Plaintiff and against the Defendant Trump. The jury found that Trump had breached a contract to permit each individual Plaintiff to purchase a .9375 percent interest in the riverboat project. In a separate verdict form, the jury also found that the Defendants had breached a contract with the individual Plaintiffs to establish and to fund a specific Charitable Foundation, in return for Plaintiffs' agreement to permit the Defendants to utilize the Plaintiffs' names and reputations in support of their riverboat license application.

The Plaintiffs appealed from the District Court's refusal to provide a remedy in response to the jury's verdict that Defendant breached a contractual agreement with the Plaintiffs to establish and fund a specific Charitable Foundation. The Trump cross-appeal asserted that the jury's verdict in favor of the Plaintiffs on the contract to permit the individuals to purchase riverboat stock should be overturned, because of alleged uncertainties in the terms of the optional seller financing proposed by Trump for the individuals to finance their individual investments. The Panel opinion found in favor of the Defendant Trump and reversed the jury's determination on the individual investment contract. However, the Panel opinion does not address the Plaintiffs' appeal of the refusal of the District Judge to remedy the second written jury verdict, finding an enforceable contract with the Plaintiffs to establish a Charitable Foundation.

The findings of the Panel concerning the alleged uncertainties in the material terms of the individual investment contract do not address, much less resolve, the issue with respect to the separate jury finding of breach of a contract to create and to fund a Charitable Foundation. In its cross-appeal, the Defendant Trump challenged only the sufficiency of the terms of the individual investment contract. The Panel was not presented with any issue on appeal concerning the sufficiency of the evidence to support the jury's separate finding of the breach of an enforceable contract to establish a Charitable Foundation. The only issue presented by the Defendant in opposition to Plaintiffs' appeal was to argue the sufficiency of the grounds given by the District Judge for refusing to enforce the contractual agreement to create and fund the Foundation.

None of the alleged uncertainties with respect to the terms of the individual investment contract apply to the jury's finding of an enforceable contract to create and fund a Charitable Foundation. Unlike the individual investors, the Foundation was not required to purchase its shares. Consequently, the terms under which the individual investors might elect to obtain seller financing of their purchase price could not even arguably have been a part of the contract to establish a Charitable Foundation. Only the individual investors, and not the Foundation, were subject to a fair market value repurchase right for their ownership interest. Even if the Panel were to conclude that a contractual right to repurchase stock at fair market value is insufficiently specific to be enforceable, without specification of a particular method for determining fair market value, as the original panel opinion arguably states, that alleged uncertainty could not affect the Charitable Foundation, whose ownership interest was never impressed with a repurchase option.

In most appeals, an appeal and a cross-appeal represent two sides of the same coin, in which a ruling on one

resolves the issues on both. But in this appeal, from separate jury verdict findings of liability on two separate contractual obligations, a resolution in favor of Trump on its cross-appeal on the individual contracts neither resolves nor addresses Plaintiffs' appeal of the failure of the District Court to enforce the jury verdict on the Foundation.

Plaintiffs/Appellants respectfully call the Panel's attention to its failure to issue an opinion or to make a ruling with respect to Plaintiffs' appeal in its opinion with respect to Defendant Trump Indiana's cross-appeal, and respectfully requests the Court to do so.

ICE MILLER

BY:James R. Fisher, Attorney No. 6847-49
Debra H. Miller, Attorney No. 10299-49
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been deposited in the U.S. Mail, first class postage prepaid, on the 25 day of July, 2001, addressed to:

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IN THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Nos. 00-1083 and 00-1138

Date:June 18, 2001

BEFORE:
Honorable FRANK H EASTERBROOK, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

WILLIAM MAYS, LOUTS BUDDY YOSHA, Trustee of the Irrevocable Trust Agreement of CYNTHIA ANN YOSHA SNYDER, Trustee of the Irrevocable Trust Agreement of BRANDON ABRAHAM YOSHA, et al.
Plaintiffs-Appellants/Cross-Appellees,

Vs.

TRUMP INDIANA, INCORPORATED and DONALD J. TRUMP,

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division No. 96-C-425, Richard L. Young, Judge

The judgment of the District Court is REVERSED, with costs, and REMANDED to the district court for the entry of judgment in favor of the defendants. The above is in accordance with the decision of this court entered this date.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Nos. 00-1083 and 00-1138

August 20, 2001

BEFORE:
Honorable FRANK H EASTERBROOK, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

WILLIAM MAYS, LOUTS BUDDY YOSHA, Trustee of the Irrevocable Trust Agreement of CYNTHIA ANN YOSHA SNYDER, Trustee of the Irrevocable Trust Agreement of BRANDON ABRAHAM YOSHA, et al.
Plaintiffs-Appellants/Cross-Appellees,

Vs.

TRUMP INDIANA, INCORPORATED and DONALD J. TRUMP,

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division No. 96-C-425, Richard L. Young, Judge

ORDER

On June 26, 2001, the plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc. All judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for

rehearing and rehearing en banc are therefore DENIED. All other pending motions are dismissed as moot.

May 24, 1994

Louis Buddy Yosha
YOSHA LANDENDORF AND TODD
2220 N. Meridian
Indianapolis, Indiana 46208

Re: Trump Hotel and Casinos Inc., d/b/a Trump Princess

Dear Mr. Yosha:

Enclosed please fmd the completed foundation documents entitled "The Trump—Indiana Charitable Foundation" with respect to the above referenced matter. In order to give the commission an idea of what we are striving for, we would like to go ahead and designate ten local charities (not an exclusive list) as part of the Foundation. In that vein, please give us an indication as to whether or not you would be willing to serve on the foundation, and a list of charities you believe should be included.

We will be setting up meetings with you during the course of the next two weeks to go over the foundation, and investment documents. We will be contacting you on or about June 1, 1994, with the date and times of the investment meetings to be held in Gary and we would appreciate having received your input with respect to the charitable organizations and/or your willingness to serve on the foundation by that time. If you should have any questions or require any additional information please do not hesitate to contact me at the number hereon at your earliest possible convenience.

Sincerely,

TABBERT HAHN KEMPF
MCKINLEY & ZANETIS, P.C.
Gregory F. Hahn

THE TRUMP-INDIANA CHARITABLE FOUNDATION

This Trust Agreement is made this_____day of _____ 1994, by and between Trump Marina Resons, Inc. (a Delaware Corporation) dba Trump Princess Indiana, Inc. (a Delaware corporation doing business in Gary, Indiana), (hereinafter referred to as the 'Donor,") and _____ and _____ as Trustees of this trust (hereinafter referred to as the "Trustees").

ARTICLE I, Name and Purpose

Section 1.1. Name of Trust. The name of this trust shall be The Trump-Indiana Charitable Foundation Charitable Foundation.

Section 1.2 Purpose of Trust The Trump-Indiana Charitable Foundation is established, organized and shall be operated exclusively for charitable, educational, scientific or literary purposes, including, for such purposes, the making of distributions to organizations described in Sec. 170(c), 2055 (a) and 2522(a) of the Internal Revenue Code of 1986, as amended (hereinafter referred to as the "Code").

ARTICLE II, Prohibited Activities

In no circumstance shall any pan of the principal of the Trust Estate or net income therefrom inure to the benefit of or be distributed to any of the Trustees or other private person, except that the trust shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes of the trust and further, no substantial part of the activities of the trust shall be the carrying on of propaganda

or otherwise attempting to influence legislation and the trust shall not participate in or intervene in (including the publishing and distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provisions hereof, the trust shall not carry on any activities not permitted to be carried on by an organization exempt from federal income tax under §§170(c)(3) of the code or by an organization, contributions to which are deductible under §§ 170(c), 2055(a) and 25 22(a) of the Code.

ARTICLE III. General Provisions

Section 3.1. Trust Fund. The property to constitute this trust and Foundation shall consist of the cash, stocks, bonds, securities, property and assets set forth in the attached Schedule A, and such other cash, stocks, bonds, securities, property and assets as anyone may, from time to time, transfer to the trust fund and be accepted by the Trustees. Such cash, stock, securities, property and assets shall be transferred to the Trustees to be held by them in trust and disposed of as provided herein.

Section 3.2. Duration of Trust. The trust created hereby shall terminate when the whole of the Trust Estate and the net income therefrom shall have been distributed. Nothing herein contained, however, shall require the Trustees to terminate the trust at any particular time and the Trustees are expressly authorized to operate and administer the trust
indefinitely so long as they shall, in their absolute discretion. believe that it can continue effectively o accomplish the purposes for which the trust is established.

Section 3.3. Trust Irrevocable. This trust is intended to qualify as a charitable trust as defined in Code § 501(c)(3) and is to be administered so as to qualify for the exemption

from taxation provided therein for a charitable trust The Trust hereunder is irrevocable and may be amended, except that in furtherance of the intent that the trust qualify as a charitable trust under Code § 501(c)(3), the Trustees may amend the terms of the trust for the sole purpose of complying with the requirements of Code § 501(c)(3) and the regulations issued thereunder.

Section 3.4. Private Foundation Rules. The Trustees are prohibited from engaging in any act of self-dealing as defined in Code § 4941(d), from retaining any excess business holdings as defined in Code § 4943(c) which would subject the trust to tax under Code §4943, from making any investments which would subject the trust to tax under Code § 4944 and from making any taxable expenditures as defined in'Code § 4945(d).

ARTICLE IV, Management and Distributions

Section 4.1. Management. The Trustees shall hold, manage, invest and from time to time reinvest the Trust Estate in the manner hereinafter provided, shall collect the income therefrom, and, after paying proper and necessary expenses. shall deal with the net income from the Trust Estate and the principal thereof as hereinafter provided.

Section 4.2. Distributions. The Trustees shall pay the net income from the trust and any amount of principal that may be necessary in order to avoid tax under § 4942 of the
Code for such qualifying purpose as the Trustees determine in their sole discretion. It is contemplated that substantially all of the net income from the Trust Estate will, ordinarily, be distributed for the purposes of the trust in each year. The Trustees are hereby authorized, nevertheless, to accumulate income in such reasonable amounts and for such reasonable periods of time as they shall deem necessary or desirable in order most effectively to accomplish the purposes of the trust

The Trustees in making distributions of principal or interest from the Trust Estate, shall first make distributions to such Indiana organizations which qualify as charitable entities for purposes of the Code or to Indiana residents who may properly receive funds that qualify for charitable purposes.

ARTICLE V, Trustees

Section 5.1. Trustees. The term 'Trustees" and the pronouns therefor shall mean the Trustees from time to time qualified and acting, and any successor or successors from time to time qualified and acting and shall be construed as masculine, feminine, or neuter, and in the singular or plural as the sense requires.

Section 5.2. Original Trustees. The Trustees who have executed this Agreement shall serve as the Original Trustees. There shall be nine Original Trustees. The Original Trustees shall serve for a term of three years, four years or tive years, according to the term specified with their signature. The term of each Original Trustee shall end on the May 31 immediately following the completion of the number of years specified.

Section 5.3. Resignation or Removal of Trustee. A Trustee may resign at any time by written notice to all other Trustees then serving. A Trustee may be removed upon the affirmative vote to that effect of a majority of the then serving Trustees, such removal to be effective upon the date specified by the other Trustees. A removed Trustee shall be notified in writing of his removal and the effective date thereof by a written notice sent by United States Certified Mail, Return Receipt Requested, or upon hand-delivery, at the address noted on the signature page of this document

Section 5.4. Successor Trustees.

(a) Upon the expiration of a trustee's term in office, death, removal, resignation, refusal or inability to serve of any Trustee, a majority of the remaining Trustees may fill such vacancy among the Trustees. A Trustee whose term is expiring may succeed him or herself, without limitation.

(b) Trustees, other than the Original Trustees, sha[l serve for a term of thirty-six (36) months. Each term shall begin on June 1. The term for a Trustee who replaces a deceased, resigned or removed Trustee shall be for the remaining term of the replaced Trustee.

(c) A replaced Trustee shall, at the request of the remaining Trustees, or successor Trustee, promptly deliver such assignments, transfers and other instruments may be reasonably required for fully vesting in such remaining Trustees or successor Trustee all estate, right, title and interest in the assets held hereunder.

(d) Every successor Trustee shall have all the powers given the originally named Trustees. No successor Trustee shall be personally liable for any act or omission of any predecessor.

Section 5.5. Voting. The decisions and acts of a majority of the Trustees shall constitute an exercise of the trust powers and discretions conferred upon the Trustees hereunder and the decisions and acts of such majority shall constitute the decisions and acts of all of the Trustees.

Section 5.6. Bond. No Trustee, wherever acting. shall be required to give bond or surety or be appointed by or account for the administration of any trust to any court

ARTICLE VI, Powers

Except as otherwise provided herein, the Trustees shall hold, manage, care for and protect the trust property and shall have the following powers and, except to the extent inconsistent herein, those now or otherwise provided by law; provided, however, that none of such powers shall be exercised in a manner that will cause the trust not to be treated as an organization exempt froth Federal income tax under § 501(c)(3) of the Code or an organization, contributions to which are deductible under §§ 170(c), 2055(a) and 2522(a) of the Code:

(a) To retain any property (including stock of any corporate trustee hereunder or of a parent or affiliate company) originally constituting the trust or subsequently added thereto, although not of a type, quality or diversification considered proper for trust investments;

(b) To invest and reinvest the trust property in bonds. stocks, mortgages, notes or other property of any kind, real or personal, suitable for the investment of trust funds;

(c) To cause any property, real or personal, belonging to the trust to be held or registered in the Trustees' name or in the name of a nominee or in such other form as the Trustees deem best without disclosing the trust relationship;

(d) To vote in person or by general or limited proxy, or refrain from voting, any corporate securities for any purpose, except that any security as to which the Trustees' possession of voting discretion would subject the issuing company of the Trustees to any law, rule or regulation adversely affecting either the company cr the Trustees' ability to retain or vote company securities, shall be voted as directed by the beneficiaries then entitled to receive or have the benefit of the income from the trust; to exercise or sell any subscription or conversion rights; to consent to and join in or oppose any voting trusts, reorganizations, consolidations, mergers,

foreclosures and liquidations and in connection therewith to deposit securities and accept and hold other securities or property received therefor;

(e) To lease trust property for any period of time though commencing in the future or extending beyond the term of the trust;

(f) To borrow money from any lender, including a Trustees hereunder individually, extend or renew any existing indebtedness and mortgage or pledge any property in the trust;

(g) To sell at public or private sale, contract to sell, convey, exchange, transfer and otherwise deal with the trust property and any reinvestments thereof from time to time for such price and upon such terms as the Trustees see fit;

(h) To employ agents, attorneys and proxies and to delegate to them such powers as the Trustees consider desirable.

(i) To compromise, contest, prosecute or abandon claims in favor of or against the trust;

0) To establish out of income and credit to principal reasonable reserves for depreciation, obsolescence and depletion;

(k) To take such action in collecting the proceeds of any life insurance payable to the Trustees (after deducting all charges by the way of advances, loans or otherwise) as the Trustees deem best, paying the expense thereof from the trust property; and the insurance company shall not take notice of the provisions of this Trust Agreement or see to the application of the proceeds, and the Trustees' receipt to the

insurance company shall be a complete release from any payment made; and,

(1) To perform other acts necessary or appropriate. for the proper administration of the trust, execute and deliver necessary instruments and give full receipts and discharges.

ARTICLE VI, Accounting & Expenses

Trustees' Accounting and Compensation. The Trustees shall render an account of and disbursements to the Donor at least annually. The Trustees shall be reimbursed all reasonable expenses incurred in the management and protection of the trust The shall also receive fair compensation.
Receipts for Trustees

ARTICLE VII, Miscellaneous

Section 12.1. Taxable Year. The taxable year of the Trust shall be the calendar year. Section 12.2. Governing Law. The law of Indiana shall govern the validity and interpretation of the provisions of this Trust Agreement

In Witness Whereof, the parties hereto have executed this instrument on the day and year first above written.

Donor:
TRUMP PRINCESS INDIANA INC.
President
Trustees:
Schedule A

Schedule A to Charitable Trust made this _____ day of _____ 1994, between Trump Princess Indiana, Inc., as Donor, and _____ ,asTrustees.

Supreme Court, U.S.
FILED
DEC 26 2001
CLERK

No. 01-712

In The

Supreme Court of the United States

IN RE: WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Seventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Is the request for a Writ of Mandamus inappropriate because the Court of Appeals for the Seventh Circuit expressly denied Petitioners' appeal on the charitable foundation issue when it decided that no contract existed?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

The parent corporation of Respondent Trump Indiana, Inc., is Trump Hotels & Casino Resorts, Inc. Trump Hotels & Casino, Inc., owns 10% or more of Respondent's stock.

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I. STATEMENT OF THE CASE

Respondent Trump Indiana, Inc., Defendant below (hereinafter "Trump Indiana") believes the Statement of the Case submitted by Petitioners William Mays and Louis Buddy Yosha, Plaintiffs below (hereinafter "Mays and Yosha"), should be modified and supplemented as follows.

Mays and Yosha's Statement of the Case contains the following passage.

> The District Court refused to enforce the Charitable Foundation contract. The defendant Trump argued, and the District Judge held, that because the contract between Trump and the plaintiffs to create the Charitable Foundation would bestow a financial benefit upon established charities that served residents of the City of Gary, the Mayor of the City of Gary was actually a third party beneficiary of the contract, by virtue of his elected office. (App. P. 36a)
>
> The District Court held that the Mayor, as the "third party beneficiary," could agree with Trump to reduce Trump's funding obligation to less than 10% of the original agreed amount, in return for Trump redirecting that benefit to a newly created charity, serving a different group of the Mayor's constituents, and to substitute the Mayor and his employees as the fund administrators.

Petition for Writ of Mandamus, pp. 2-3. Using this as a springboard, Mays and Yosha argue, "The District Court determined that the Mayor, solely by virtue of his office, became the third party beneficiary of a contract between plaintiffs and Trump . . . and as such the Mayor was

empowered to intercept and redirect the funds. . . . . " Petition for Writ of Mandamus, p. 8.

These passages inaccurately summarize the District Court's ruling. The District Court's findings on this issue were that the residents of the City of Gary were the intended third-party beneficiaries of the contract entered into with Yosha and Mays. (Finding of Fact 31; Petitioner's App. 36a) The City of Gary acted for the benefit of the third-party beneficiaries in its negotiations with Trump Indiana. (Finding of Fact 32; Petitioner's App. 36a) The charitable foundation that was actually formed replaced the charitable trust contemplated in Trump Indiana's agreement with Mays and Yosha. (Finding of Fact 33; Petitioner's App. 36a)

Mays and Yosha's Statement of the Case further implies this was the only basis for the District Court's decision, omitting all of the other reasons supporting the ruling. In fact, the District Court's ruling was supported by several other findings and conclusions, including the following:

- The contract was not sufficiently specific to permit specific performance. (Finding of Fact 38; Petitioner's App. 37a)

- The creation of a charitable foundation in place of the one contemplated in the agreement between Mays and Yosha was an equitable substitute for the charitable foundation originally contemplated. (Conclusion of Law 22; Petitioner's App. 42a)

- It would be vain and useless to establish a second foundation to serve the same purpose as the

existing foundation. (Conclusion of Law 25; Petitioner's App. 43a)

- Ordering a second charitable foundation would have resulted in a double recovery. (Conclusion of Law 26; Petitioner's App. 43a)

- Mays and Yosha's charitable foundation claim intermingled specific performance and money damages, requiring the District Court to speculate in order to make a monetary award. (Conclusion of Law 27; Petitioner's App. 43a)

- The contract could not be specifically enforced without significantly modifying the contract. (Conclusion of Law 28; Petitioner's App. 44a)

- Because Mays and Yosha essentially sought money, they had an adequate remedy at law that precluded specific performance. (Conclusion of Law 29; Petitioner's App. 44a)

II. ARGUMENT

Rather than seeking certiorari, Mays and Yosha seek a writ of mandamus to compel the Court of Appeals to address an issue they say was neglected on appeal. It is no surprise Mays and Yosha eschew certiorari, for it is not available in a case such as this, which was resolved through the application of routine state contract law. With the certiorari door tightly closed, Mays and Yosha fix their gazes upon mandamus.

Mays and Yosha contend the Court of Appeals "did not address the separate jury finding of breach of the contract to create and fund the Charitable Foundation. Nor did it address the plaintiff's appeal of the District Court's refusal to enforce a remedy for Trump's breach of

obligation to create and fund the Charitable Foundation." Petition for Writ of Mandamus, p. 4. The Court of Appeals' decision shows otherwise.

The Court of Appeals recognized it was dealing with a single contract when it framed the issue it faced. "The pivotal issue is whether the alleged contractual agreement Mays and Yosha say they had with Trump was sufficiently certain to create the two enforceable obligations they seek to establish." (*Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 357 (2001); Petitioner's App. 13a). "The first obligation would require Trump to cut Mays and Yosha in on the final deal to the extent of a 1 percent . . . ownership interest for each. The second obligation would be to create a charitable foundation exactly as described in the letters of February 26, April 6, and September 26 of 1994." (*Id.*; Petitioner's App. 13a)

The Court of Appeals recognized that the appeal involved an attempt to enforce two separate obligations found in a single agreement. In light of this, the assertion that the Court of Appeals ignored Mays and Yosha's charitable foundation appeal is untrue. The appellate court did not forget to address the existence of a contract relating to the charitable foundation. It found that no contract existed. Period! This "no contract" ruling applied to both of the obligations Mays and Yosha sought to impose.

The Court of Appeals' ruling was simple and unequivocal. "[W]e think no binding contractual agreement was reached." (*Mays*, 255 F.3d 351, 357; Petitioner's App. 13a) "[T]his complicated deal was never reduced to the kind of solid contract that could be comfortably

enforced in a court of law." (*Id.* at 359; Petitioner's App. 16a) The effect of this decision was also simple and unequivocal: Mays and Yosha are not entitled to recover on their contract claims. This includes their charitable foundation claim.

"The remedy of mandamus is a drastic one to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 190 (1980); *Kerr v. United States Dist. Ct. for the Northern District of California*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2124 (1976). Mandamus is not intended to be a substitute for appeal. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 660, 98 S.Ct. 2552, 2556 (1978) (*quoting Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941 (1943)). The party seeking this remedy must demonstrate "exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form . . . ." Sup. Ct. R. 20; *Hohn v. United States*, 524 U.S. 236, 263, 118 S.Ct. 1969, 1983 (1998).

There is nothing extraordinary about what happened here. The Court of Appeals addressed the basic issue that was determinative of Mays and Yosha's claims. When it ruled that there was no contract, it necessarily decided the charitable foundation question.

III. CONCLUSION

There is no basis for mandamus for there is nothing left to be done by the Court of Appeals. The Petition for Writ of Mandamus should be denied.

Respectfully submitted,

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